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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 20

NOB HILL GENERAL STORES, INC., Respondent, and UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 5, Charging Party.	No. 20-CA-209431 **CHARGING PARTY'S BRIEF ON STIPULATED RECORD TO THE ADMINISTRATIVE LAW JUDGE**

I. INTRODUCTION

This is a simple case. The Union requested information relevant to the staffing of a new store. The employer declined. For the reasons pointed out below, the employer was obligated under the National Labor Relations Act to provide the information to the Charging Party.

II. ARGUMENT

The Collective Bargaining Agreement contains the typical after-acquired stores or new stores clause. *See* Section 1.14 of the Agreement. There are two relevant paragraphs:

> Notwithstanding any language to the contrary contained in this Agreement between the parties, it is agreed this Agreement shall have no application whatsoever to any new food market or discount market until fifteen (15) days following the opening to the public of any new establishment. Neither shall this agreement

> have any application whatsoever to any food market or discount center which is reopened after it has been closed for a period of more than thirty (30) days until the fifteenth (15th) day following the date of such reopening to the public.
>
> The Employer shall staff such new or reopened food market with a combination of both current employees and new hires, in accordance with current industry practices of staffing such stores with a cadre of current employees possessing the necessary skills, ability and experience, plus sufficient new hires to meet staffing requirements. Employees, who are thus transferred, upon whom contributions are made to the various trust funds, shall continue to have contributions to the several trust finds made on their behalf in the same manner and in the same amount per hour as such contributions were made prior to their transfer.

Although the first paragraph indicates that the Agreement "shall have no application whatsoever to any new food market ... until fifteen (15) days from the opening to the public of any new establishment …" the next paragraph has a staffing obligation. That staffing obligation is typical in the food industry and requires that the employer allow current employees to staff the new store. The obvious purpose of that is to allow a core of Union employees to move into the new store. This benefits the employer, who will then have a core of trained and skilled employees to open a new store successfully. On the other hand, it allows the Union to maintain its representation status in the new store because the first employees in the store are presumably Union members and support the organization.

We know that the parties intended that the staffing would occur as suggested above because of the sentence that states "[e]mployees, who are thus transferred …."

Although we agree that there is some apparent inconsistency, this sentences makes it clear that the parties contemplated both transfers and those contributions would be made on behalf of the transferred employees.

In this case, the Union sought information regarding staffing of the new store. That information was initially contained in the September 25, 2017 letter and is as follows:

> According to published sources, Nob Hill will be opening a store in Santa Clara in October of this year. Nob Hill has not sought to negotiate over this opening and the impact on the bargaining unit.

> It has ignored the provisions of the contract which apply to this store opening.
>
> In order for Local 5 to administer the contract and to bargain over the effects of the opening of this store, Local 5 requests some information. Because of the timing of the opening of the store, this information needs to be provided within the next week.
>
> 1. Please provide a list of the classifications and the number of employees in each classification to be initially hired in the store. Let us know how many in each classification will be full time (40 hours per week) and part time.
>
> 2. Provide the same information for the employees two months and 6 months after the store is opened.
>
> 3. Provide a list of those employees who are currently working in the bargaining unit who have been asked to work in the new store. We want the names of those employees and the dates that they were asked to work in the store.
>
> 4. Please provide a list of all current employees who have indicated their willingness to work in the store or have agreed to work in the store as of the date of this request and as of the date of your reply. Provide the classifications they will be working in and the wage rates promised them
>
> 5. Please provide a copy of any employee handbook that you intend to apply to the employees in the store.
>
> 6. Please provide a statement of the ranges of rates to be paid to each classification of employee in the store.
>
> 7. Please provide a copy of any benefit plans to be applicable to employees in the store.
>
> 8. When will employees begin actually working in the store? What is the projected opening date?

The employer has refused to provide any information.

First, even assuming that there was no after-acquired or new stores clause, the Union's information request would be relevant to its representation responsibilities. It is plainly a mandatory subject to bargain about transfers to other locations. The information was relevant to the transfer process and in the interest of the employees to transfer. Indeed, the other

information provided by the employer shows that it had a practice of allowing employees in both union-represented positions and positions which, unfortunately, do not have the advantage of being represented by a union to transfer. Thus, because of the employer's practice of transferring employees from all sorts of facilities, the Union was entitled to information in order to assist employees in making the decision whether to transfer. The information was plainly relevant to that.

Here, there's even a stronger reason. There is collective bargaining language providing that a core of employees will staff the new store. The Union was entitled to the information in order to administer the Collective Bargaining Agreement.

The Board has very recently addressed these issues in *DirectSat USA, LLC*, 366 NLRB No. 40 (2018). The Board stated at footnote 2:

> The Board does not rely on the judge's statement that, in cases where a union requests information relative to matters outside the bargaining unit, "the standard is somewhat narrower and relevance is required to be somewhat more precise." The Board has found that a union satisfies its burden to establish the relevance of non-unit information if it demonstrates either "a reasonable belief, supported by objective evidence, that the requested information is relevant," *Disneyland Park*, 350 NLRB 1256, 1257–1258 (2007) (citation omitted), or "a 'probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities,'" *Kraft Foods North America, Inc.*, 355 NLRB 753, 754 (2010) (quoting *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967)). Either way, the Board has consistently emphasized that the required showing is subject to the same broad, "discovery-type standard" applicable to other information requests, and that the union's burden is therefore "not an exceptionally heavy one." *Kraft Foods, supra* (internal quotation marks and citations omitted); accord, e.g., *A-1 Door & Building Solutions*, 356 NLRB 499, 500 (2011); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997); *Shoppers Food Warehouse*, 315 NLRB 258, 259 (1994).

Plainly, the Union meets this standard in this case. *See also Int'l Game Tech.*, 366 NLRB No. 170 (2018) (information about other locations relevant and employer must provide);

The Board's decision in *Pall Biomedical Products Corp*., 331 NLRB 1674 (2000), *enforcement denied*, 275 F.3d 116 (D.C. Cir. 2002), is instructive. The Board held that the transfer of employees to a new facility vitally affected employment. The D.C. Circuit had trouble only with the issue of the extension of recognition to the Union. Thus, the Board's holding that the issue of transfer to a new location is still good law.

Raley's has already litigated this issue in *Raley's*, 336 NLRB 374 (2001). In that case, the Board found that this was an after-acquired stores clause that required recognition. The Board specifically rejected the argument that Nob Hill will make in this case, explaining that the two paragraphs have independent application.

Raley's has been approved in subsequent Board decisions. *See Supervalu, Inc.*, 351 NLRB 948 (2007); *Shaw's Supermarkets*, 343 NLRB 963 (2004); *Dana Corp.*, 356 NLRB 256 (2010); and *Dr. Pepper Snapple Grp.*, 357 NLRB 1804 (2011). Although those cases generally deal with the question of whether recognition must be granted, this case only goes to the right of the Union to seek information regarding transfers in accordance with the terms of the Agreement.

For these reasons, the Union's request concerns a mandatory subject of bargaining, concerning transfers.

The Union did not seek recognition, but only information to enforce the right of its members under the contract to transfer as a core group to the new store. *See, generally*, Robert A. Gorman & Matthew W. Finkin, *Labor Law Analysis and Advocacy* at 21.8, pp. 822-823 (2013).

III. REMEDY

The Union requests the following remedy:

1. That the Notice be posted for the length of time between when the violation occurred and when the ultimate Notice is posted. Any shorter period only benefits the employer;

2. A Notice reading in that store and all the Union stores;

3. Posting of the Notice in all of the Union stores, because this affects the Collective Bargaining Agreement, which governs all the Union stores and where employees could transfer;

4. A posting in all Raley's stores of all banners because the unfair labor practice affects all employees who might have transferred;

5. That, at the Notice reading, the Union be allowed to videotape the reading by the employer so that that recording may be put on the Union's website;

6. That the employer be ordered to provide signed copies of the Notice to the Union for posting;

7. That the Notice contain relevant language indicating the violation:

> We have been found to have violated the National Labor Relations Act by refusing to provide information to UFCW Local 5 that is necessary and relevant to bargaining. The information we failed to provide, and which we will now provide, related to the staffing of our new store in Santa Clara.

This language is more effective than the simple language of having been found to have violated the Act;

8. The Notice should not contain any reference to the right of employees to refrain from Section 7 activities, since that is not involved in this case;

9. Employees should be provided a copy of the Board's Decision and allowed two hours on company time to read the Board's Decision and understand it;

10. The Union should be provided a list of the names and addresses of employee who have worked in the store since it opened and on a continuing basis for one year after the employer complies with the decision and order;

11. The employer should be required to mail the Notice to all employees, at their last known address, in all units who no longer work for the company.

12. A broad order should be issued since the employer is a repeat violator of the Act, as noted in the above cases. It has a proclivity to violate the Act. *See Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

IV. CONCLUSION

For the reasons suggested above, the Administrative Law Judge should issue a prompt decision, finding that the employer has violated the Act and ordering the remedies suggested above.

Dated: September 27, 2018

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

Attorneys for Charging Party UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 5

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PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On September 27, 2018, I served the following documents in the manner described below:

CHARGING PARTY'S BRIEF ON STIPULATED RECORD TO THE ADMINISTRATIVE LAW JUDGE

☑ (BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

By E-Filing

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on September 27, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler